

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

AG. G. a minor, by and through his guardian ad litem, JESSICA AQUINO; AR. G., a minor, by and through his guardian ad litem, JESSICA AQUINO; KARLA GONSALEZ, individually; and AUGUSTIN GONZALES JR., individually;

Plaintiffs,

vs.

CITY OF HAYWARD, a municipal corporation; MARK KOLLER, individually; PHILLIP WOOLEY, individually; MICHAEL CLARK, individually; TASHA DECOSTA, individually; and DOES 1-100, inclusive,

Defendants.

Case No. 4:19-cv-00697 DMR

**DECLARATION OF BENJAMIN  
NISENBAUM IN SUPPORT OF  
PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT**

**Date: July 9, 2020  
Time: 1:00 p.m.  
Courtroom: 4**

**Hon. Donna M. Ryu**

# EXHIBIT O

DEPOSITION OF SERGEANT FAYE MALONEY

IN THE UNITED STATES DISTRICT COURT  
IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

--o0o--

AG.G. a minor, by and through )  
his guardian ad litem, JESSICA )  
AQUINO; AR.G., a minor, by and )  
through his guardian ad litem, )  
JESSICA AQUINO; KARLA GONSALEZ )  
individually; and AUGUSTIN )  
GONSALEZ, JR., individually, )

Plaintiffs, )

vs. )

CASE NO.: 4:19-cv-00697 DMR

CITY OF HAYWARD, a municipal )  
corporation; MARK KOLLER, )  
individually; PHILLIP WOOLEY, )  
individually; MICHAEL CLARK, )  
individually; TASHA DECOSTA, )  
individually; and DOES 1-100, )  
inclusive, )

Defendants. )

CERTIFIED COPY

DEPOSITION OF SERGEANT FAYE MALONEY - PMK

MONDAY, JANUARY 27, 2020

REPORTED BY: KELLY L. MCKISSACK, CSR #13430

DEPOSITION OF SERGEANT FAYE MALONEY

1 Pursuant to Notice of Taking Deposition, and  
2 on Monday, January 27, 2020, commencing at the hour of  
3 2:57 p.m., thereof, at 7677 Oakport Street, Suite 1120,  
4 Oakland, California 94621, before me, KELLY MCKISSACK,  
5 CSR No. 13430, a Certified Shorthand Reporter and  
6 Deposition Officer of the State of California, there  
7 personally appeared:

8  
9 FAYE MALONEY,

10  
11 called as a witness by the Plaintiffs, who having been  
12 duly sworn by me, to tell the truth, the whole truth and  
13 nothing but the truth, testified as hereinafter set  
14 forth:

15  
16 --oOo--  
17  
18  
19  
20  
21  
22  
23  
24  
25

DEPOSITION OF SERGEANT FAYE MALONEY

1 FAYE MALONEY,  
2 having been first duly sworn, testified as follows:

3 THE WITNESS: (TO OATH) I do.  
4

5 EXAMINATION

6 BY MR. NISENBAUM: Q. Can you please state and spell  
7 your name.

8 A. My name is Faye Maloney, F-A-Y-E. My last  
9 name is Maloney, M-A-L-O-N-E-Y.

10 Q. Okay. And it's my understanding you're a  
11 Hayward police officer?

12 A. Yes, I am.

13 Q. And what rank are you?

14 A. I'm a police sergeant.

15 Q. How long have you been a sergeant?

16 A. Since August 21, 2017.

17 Q. All right. Have you had your deposition taken  
18 before?

19 A. No, I haven't.

20 Q. Have you testified in court?

21 A. Yes, I have.

22 Q. And when you were at the police academy did  
23 you receive training in providing courtroom testimony?

24 A. Yes, I have.

25 Q. Okay. A deposition is very much like

DEPOSITION OF SERGEANT FAYE MALONEY

1 negotiator, the person hasn't already acquiesced to the  
2 police?

3 A. Is that like submitted?

4 Q. Right.

5 A. Yes.

6 Q. And the whole point of using the deescalation  
7 and negotiation is to gain their compliance, correct?

8 A. Safely, yes.

9 Q. Right. Is to safely gain their compliance.  
10 So initially they're not trying to get taken into  
11 custody, but then ultimately they acquiesce if it's  
12 successful?

13 A. Yes.

14 Q. Okay. How important is the concept of time in  
15 crisis negotiation?

16 A. If allowable, it's suggested. If it's  
17 feasible.

18 Q. Isn't it ultimately necessary?

19 A. It's not every single situation. So depends  
20 on the safety of others. So depends on the situation.  
21 If you're communicating with someone that's alone,  
22 isolated, and that's having a crisis, yes, time --  
23 time's, you know, in your essence. If there's someone  
24 else in danger, time, you don't really have that luxury.

25 Q. Do you have any training with respect to how



DEPOSITION OF SERGEANT FAYE MALONEY

1 you try to make time, in other words, how you try to  
2 elongate time?

3 A. Elongate time speaking to the person in  
4 crisis?

5 Q. Yes. So that a situation isn't rushed.

6 A. Yes. It's a part of our deescalation  
7 training. But it's also dependent on what you're  
8 responding to. We're not allowed time if there's  
9 another person that's in danger.

10 Q. Right. But you're trained to try to contain  
11 the person within a perimeter, correct?

12 A. Yes, when feasible. Yes.

13 Q. Right. Well, you have to try to do it first,  
14 right?

15 A. Not necessarily. If it's a situation  
16 unfolding, if you have someone that's actively going  
17 after someone. If you have, like, for example, an  
18 active shooter you don't know what you're going into.  
19 That's not a situation where we're going to have the  
20 luxury of making time.

21 Q. I get that. But I'm saying where it's  
22 reasonable. Where it's reasonably possible to do it?

23 A. Yes, where it's reasonable possibly to do it,  
24 yes.

25 Q. Okay. But in order to do that you have to

DEPOSITION OF SERGEANT FAYE MALONEY

1 actually take the steps to do it, correct?

2 A. By containment.

3 Q. Yes.

4 A. Yes.

5 Q. And so how -- what is your understanding of  
6 how officers are supposed to contain a person, let's say  
7 they're not holed up in a room, but they're out on the  
8 street and they've got people sufficiently say at least  
9 15 feet away from the person?

10 A. Well, you'd have to first ensure if it's on  
11 the street that certain areas, walkways, streets are  
12 blocked so that person is truly contained and that  
13 person has no access to anywhere where he would get out  
14 of that containment area.

15 And so, for example, if they're in a vehicle,  
16 that's a containment. Because you can block off  
17 roadways. You can block off areas where that person can  
18 go into either businesses. You know, or if there's  
19 homes nearby, that would be a containment. But it's  
20 really situational. I can't really pinpoint to one  
21 incident or just on the street.

22 Q. But if you're attempting to establish a  
23 perimeter around someone for purposes of containing  
24 them, what you would want to do, correct me if I'm  
25 wrong, what you'd want to do is try to create space

DEPOSITION OF SERGEANT FAYE MALONEY

1 around the person and have sufficient officers around  
2 the person where the person wouldn't be able to flee  
3 past them if they chose to?

4 A. Again, it's depending. It's not the same for  
5 every situation. Because you could be in the middle of  
6 a street and you can contain that person, but you're not  
7 going to be able to be so close to them that you're  
8 containing them from going into a building or a, you  
9 know, a house yard or getting into a car and fleeing.  
10 So it really depends. I can't really answer broadly.  
11 It has to be situation-specific with knowing the  
12 environment that's around you.

13 Q. Okay. But you would have to take steps to do  
14 that? If you were to attempt to establish containment,  
15 first you want to establish a perimeter, correct?

16 A. Yes.

17 Q. Okay. To establish a perimeter that means a  
18 perimeter around the person, correct?

19 A. Yes.

20 Q. And if they're not holed up in a room but on a  
21 street, is there a particular distance as optimal?

22 A. It, again, it depends on what that person is  
23 going through. It depends on what you're responding to.  
24 So if it's an unarmed person that's going -- having  
25 either a mental crisis or they're on drugs and they're



DEPOSITION OF SERGEANT FAYE MALONEY

1 coming off that and they're in a psychotic or  
2 hallucinative state of mind, you have more control.  
3 Because they're first off unarmed. So if they start to  
4 deviate from the area that you're containing them, it's  
5 a lot easier for you to move with them.

6 But it really it's situational based. I can't  
7 stick to one way or another. Because it's situationally  
8 based.

9 Q. Okay. How about if they're armed with this?  
10 They're holding that. I'm showing you a picture of a  
11 razor blade. It was previously marked as the second  
12 page of Plaintiffs' Exhibit F. If that's the only  
13 weapon that they're holding.

14 A. Um-hmm.

15 Q. Is that something where officers would be  
16 unable to establish a perimeter?

17 A. It, again, it depends on the situation.

18 Q. Okay. Well, you said one of the factors is  
19 whether they're armed or not?

20 A. Um-hmm.

21 Q. Obviously, anything could be a weapon?

22 A. Yes.

23 Q. So assuming that the person has that razor  
24 blade that I just showed you.

25 A. Yes.

DEPOSITION OF SERGEANT FAYE MALONEY

1 Q. Now, let's say they're holding it and they're  
2 walking slowly. Is that a situation where officers  
3 should be able to form a perimeter around them?

4 A. Yes. Depending on the danger that it's  
5 showing to everyone around them.

6 Q. And with that type of weapon, that razor  
7 blade, it's dangerous obviously if it gets close to an  
8 officer, correct?

9 A. Yes.

10 Q. And so officers are trained to be able to have  
11 a moving perimeter, correct?

12 A. Not always. We do not have the duty to  
13 retreat.

14 Q. I'm confused.

15 A. So if you're faced with a person with a weapon  
16 and you have to be able to contain them. You're going  
17 to have to be really careful on where you're moving.  
18 Because if you're moving to an area that you're not  
19 aware of, you're -- behind you, next to you, where are  
20 you taking them on the street, you have to -- you have  
21 to face the threat that's coming at you.

22 So you can -- you can try to stop it as it's  
23 coming. But if someone's walking at you with that and  
24 they're not listening to your commands, you have to be  
25 cognizant of what's in your surroundings before you make

DEPOSITION OF SERGEANT FAYE MALONEY

1 that determination where you're going to start making  
2 decisions to moving people. Because these things are  
3 unfolding very rapidly.

4 Q. I get that. But you said something, I thought  
5 I heard you say, "We don't have a duty to retreat"?

6 A. So if we are faced with a threat, we do not --  
7 we do not have the duty to leave the threat and walk  
8 away.

9 Q. I thought for a moment you were saying you  
10 didn't have, if it was reasonable, to just step out of  
11 the way, for example?

12 A. Oh, no.

13 Q. To step back.

14 A. No. That's not what I meant.

15 Q. Okay. I want to be clear on that.

16 A. Yes. If it's reasonable, yes.

17 Q. Right. Exactly. If the choice is you either  
18 shoot the person or you step back, you just step back,  
19 right?

20 A. Yes.

21 Q. Okay. Thank you. All right.

22 So if you're able to establish -- I assume  
23 that perimeters themselves are a dynamic things, too, in  
24 that they can change and they can move?

25 A. Yes.

DEPOSITION OF SERGEANT FAYE MALONEY

1 wouldn't even need police, right?

2 A. Correct.

3 Q. So, I mean, we're assuming here that there is  
4 some level of resistance, some level of contrariness  
5 where the person doesn't want to be taken into custody  
6 or the person might be -- strike that.

7 Where the person has indicators of suicide by  
8 cop where they're saying, you know, shoot me as they  
9 walk towards the officer, what next -- what should the  
10 officer do? They've got a box cutter in their hand, the  
11 person does, and they're saying shoot me.

12 A. You would have to give them commands to stop,  
13 to drop what's in their hands and try to communicate  
14 with them if you have the time.

15 Q. And would you say to another officer, tase  
16 them?

17 A. If you're actively engaging and communicating  
18 with that person you might not be able to. You might  
19 have opportunities to, but it depends on how fast the  
20 situation is unfolding.

21 Q. And ultimately you would have to think about  
22 saying that in order to say that, correct? You have to  
23 consider it?

24 A. Yes. And, you know, our department is trained  
25 on that. So it just depends on how to deal with the



DEPOSITION OF SERGEANT FAYE MALONEY

1 situation.

2 Q. So, and everyone in your department is trained  
3 on that?

4 A. On deescalation?

5 Q. On using deescalation.

6 A. Yes.

7 Q. And everyone is trained on using the Taser as  
8 a less lethal alternative to lethal force?

9 A. Yes.

10 Q. Okay. And everyone is trained that if the  
11 Taser is as reasonable or as capable of use as a gun,  
12 that the Taser should be used instead of the gun?

13 A. When feasible, yes.

14 Q. Okay. I don't have any other questions.  
15 Thank you.

16 A. Thank you.

17 THE COURT REPORTER: Again, would you like a  
18 transcript?

19 MR. VIGILIA: Yes, please. Thanks.

20 (Whereupon, at 3:32 p.m., the deposition of Faye Maloney  
21 was concluded, this date.)

22

23

24

25

-----  
Faye Maloney

## DEPOSITION OF SERGEANT FAYE MALONEY

1 STATE OF CALIFORNIA )  
2 ) ss.  
3 COUNTY OF ALAMEDA )  
4

5 I hereby certify that the witness, Faye  
6 Maloney, in the foregoing deposition appeared before  
me, Kelly McKissack, a Certified Shorthand Reporter and  
7 a disinterested person.

8 Said witness was then and there at the time  
and place previously stated by me placed under oath to  
9 tell the truth, the whole truth and nothing but the  
truth in the testimony given on the date of the within  
10 deposition; that the deposition is a true record of the  
witness' testimony as reported by me.

11 The testimony of the witness and all questions  
and remarks requested by Counsel was reported under my  
12 direction and control, caused to be transcribed into  
typewritten form by means of Computer-Aided  
13 Transcription.

14 I am a Certified Shorthand Reporter licensed  
by the State of California, and I further certify that I  
15 am not interested in the outcome of the said action, nor  
connected with, nor related to any of the parties in  
16 said action, nor to their respective counsel. I am not  
of counsel or attorney for either or any of the parties  
17 to the case named in the within caption.

18 IN WITNESS WHEREOF, I have hereunto affixed my  
signature this 10th day of February, 2020  
19  
20

21 \_\_\_/s/Kelly McKissack\_\_\_\_\_  
22

23 Kelly McKissack  
Certified Shorthand Reporter  
24 California License No. 13430  
25

--o0o--